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No. 89-1204

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF DEFENSE, PETITIONER

v.

NATIONAL SECURITY ARCHIVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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This case involves the scope of the exemption from search fees under the Freedom of Information Act (FOIA) for "representative[s] of the news media." 5 U.S.C. 552(a)(4)(A)(ii). We have explained in the certiorari petition that the court of appeals seriously erred in expanding that exemption to cover respondent and other organizations similarly situated, which bear no resemblance to members of the "news media" as commonly understood and as defined in Defense Department regulations and Office of Management and Budget guidelines. Respondent's defense of the decision below ignores the ordinary meaning of the statutory text; fails to give the deference due the administrative interpretation under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984); and improperly relies on a few floor statements by individual Members of Congress that

conflict with other floor statements and with Congress's deletion of statutory language that would have specifically applied to respondent's activities. But most fundamentally, respondent's submission ignores the central statutory requirement that a qualifying requester be in the business of disseminating *news*.

Respondent's attempt to portray the decision below as narrow and fact-bound is unavailing. Respondent alone has already filed several *thousand* FOIA requests, often wide-ranging in nature, for the records of various agencies responsible for the national security, foreign relations, and intelligence functions of the United States. In addition, the court of appeals' broad construction of the term "representative of the news media" opens a sizeable loophole in the FOIA fee structure by exempting any organization that seeks to amass government records at government expense and then broker them to third parties. Congress carved out the special exemption from search fees for newspapers, radio stations, news magazines, and other members of the "news media" because they have a special role in informing the public about current affairs and because the information they request under the FOIA therefore could be expected to lead to a direct and immediate benefit for the public at large in its receipt and understanding of genuine news. Respondent would set the exemption loose from this basic purpose.

1. In defending the court of appeals' construction of the term "representative of the news media," respondent first makes the remarkable assertion that DoD "has not even been able to formulate an alternative definition of the statutory term" (Br. in Opp. 5; see also *id.* at 8, 10). In fact, DoD has furnished an explicit definition of that term in its FOIA fee regulations, based on the identical provision in the OMB guidelines. The regulations and guidelines, which were issued pursuant to specific statutory directive (5 U.S.C.

552(a)(4)(i)), define the statutory term to mean "any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." 32 C.F.R. 286.33(e)(7)(i); 5 C.F.R. 1303.30(j). In addition, they define "news" to mean "information that is about current events or that would be of current interest to the public," and delimit the scope of the term "news media" by identifying familiar examples of entities that are part of the media—"television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of 'news') who make their products available for purchase or subscription by the general public." *Ibid.*[1] This detailed administrative definition of the operative statutory term should have been sustained by the court below under *Chevron*.[2]

Respondent's related assertion that the Defense Department "never once states what it believes [the] plain meaning [of the statutory term] to be" (Br. in Opp. 6 n.5) is refuted by our quotation (Pet. 16) of the accepted definition of the words "media" ("the means of communication, such as radio and television, newspapers, and magazines, that reach or influence people widely") and "news" ("a report of a recent event"). We also explain (Pet. 18) that "the

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[1] OMB explained in issuing its guidelines that "[w]hile these examples are not meant to be all-inclusive, they *are* meant to be limiting, and to give meaning to the phrase 'publish or broadcast news' so that it implies something more than merely 'make information available.' " 52 Fed. Reg. 10,015 (1987).

[2] Respondent does not dispute that the DoD regulations and OMB guidelines are the sort of administrative measures to which the analytical framework of *Chevron* applies. Respondent argues only that the *Chevron* "crutch" is unavailable here because, in its view, the meaning of the statutory exemption is "clear" from the legislative history. Br. in Opp. 6 n.5, 14-15 . As we explain in the text, this argument is without merit.

meaning given the statutory term 'representative of the news media' by the OMB guidelines and DoD regulations is essentially identical to the plain meaning of that term." In fact, it is precisely because the DoD regulations and OMB guidelines define the statutory term in accordance with its ordinary meaning that the court below was especially unjustified in disregarding the administrative construction.

2. Respondent endorses (Br. in Opp. 5-6) the definition of the term "representative of the news media" fashioned by the court of appeals: a "person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." See Pet. App. 13a. This formulation, however, omits the critical limiting principle in the Act, guidelines, and regulations that qualifying requests must be made on behalf of persons who are engaged in the dissemination of *news*, not persons who may disseminate some sort of *information*, broadly defined, that is of potential interest to a segment of the public. Purely historical facts or technical or other data constitute "information," and almost any such facts or data in government files would be of at least "potential" interest to some members of the public. Thus, under respondent's view, any requester who represents that he intends to publish information in some form would be a "representative of the news media." The result would be an open-ended and wholly unwarranted expansion of Congress's carefully circumscribed exemption.

For example, although the information contained in the *Encyclopedia Britannica* is surely of "potential interest" to some members of the public, its publisher is just as surely not a member of the "news media." Neither is respondent: the sale of microfiche copies of thousands of pages of government documents, accompanied by indices that merely facilitate access to the documents themselves for research

purposes, is far removed from the publishing of a newspaper or the broadcasting of news over the radio or television – the standard means for disseminating "news" that are cited in the legislative history (see Pet. 21-22), including that quoted by respondent (Br. in Opp. 8), and in the DoD regulations and OMB guidelines.[3]

3. Respondent erroneously relies (Br. in Opp. 8-11) on excerpts from a document inserted in the Congressional Record by Representatives English and Kindness stating that "book authors who can demonstrate that their work is likely to be published also qualify" and that "magazines [and] newsletters; television, radio, and other broadcasters; and book publishers also automatically qualify as traditional news media." 132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986). Such bare assertions in the legislative history cannot overcome the plain meaning of the statutory language. In any event, a publisher could qualify for preferred fee status only if the information in the particular book it proposed to publish (like information in a newspaper or radio or television broadcast) would consist of "news" – *i.e.*, only if the book would contain a discussion of current events or if the book's disclosure of past events would be "news" because of its immediate interest to the public. This possible rationale for permitting a book publisher to benefit from the fee exemption in narrow circumstances does not extend to the publication of books about historical events; yet it is historical events that are the focus of respondent's planned document sets, and therefore of its FOIA requests. See Pet. 25 & n.9. For this reason, the New York Times' publication of the *Pentagon Papers*, cited by respondent (Br. in

[3] Respondent's contention (Br. in Opp. 14-16) that it qualifies as a "representative of the news media" under the DoD regulations and OMB guidelines is contrary to the interpretation of those provisions by the agencies themselves and by the courts below. See Pet. App. 3a-4a, 11a-13a, 20a.

Opp. 13), does not suggest that *all* book publishers are automatically encompassed by the statutory term "representative of the news media," without regard to the newsworthiness of the proposed book.

Respondent's activities are, of course, even further removed from those of the "news media" than are the activities of an ordinary book publisher. Respondent proposes to do nothing more than sell sets of microfiched copies of the documents it obtains from the government under the FOIA. Such limited sales to a relative handful of university libraries, research institutions, and others that can afford to purchase document sets and have access to them on their own premises are essentially an extension of respondent's *library* activities.

Respondent attempts to avoid this conclusion by relying (Br. in Opp. 13) on its supposed "editorial judgment" in selecting documents to be included in a set and its preparation of indices to facilitate access to the documents. Respondent would have the tail wag the dog. Just as a university library's publication of its card catalog or book list would not transform it into something other than a library or render it a member of the "news media," respondent's ancillary preparation and sale of finding aids to facilitate the use of the documents it obtains from the government does not transform respondent from an "Archive" into a member of the "news media."[4] And although the organization of a large mass of government documents and the preparation of finding aids to facilitate access to them presumably requires some judgment, it is that of an archivist or librarian, not the *editorial* judgment exercised by a

[4] Respondent relies (Br. in Opp. 12 & n.12) on the potential eligibility of free-lance journalists for preferred fee status. However, the OMB guidelines and DoD regulations state that journalists are eligible only if they are "working for a news organization." 5 C.F.R. 1303.30(j); 32 C.F.R. 286.33(e)(7)(i). Respondent is not a "news organization."

newspaper or television station in digesting raw information and explaining it to the public.[5]

4. Respondent's reliance on the statements about book publishers in the document inserted in the Congressional Record by Representatives English and Kindness illustrates the deeper flaw in respondent's submission. Like the court of appeals, respondent advances a definition of the term "representative of the news media" that is grounded on these and a few other snippets of legislative history, rather than the ordinary meaning of the statutory term. As a result, respondent, like the court of appeals, stands the task of statutory construction on its head: it is the statutory language that must control, at least in the absence of a clearly expressed intention to the contrary in the legislative history. There is no such clearly expressed intention here.

Even the floor statements respondent cites do not necessarily support its view of the exemption. For exam-

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[5] Citing *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 229-230 (1987), respondent suggests (Br. in Opp. 11 n.11, 12 & n.13) that a distinction for FOIA fee purposes between books on the one hand and newspapers and magazines on the other would raise serious First Amendment issues. *Arkansas Writers' Project*, however, involved a tax imposed on publishers, not access to information belonging to the government itself. Compare *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 10-11 (1978) (no First Amendment right of access to government information). Moreover, in invalidating the tax in *Arkansas Writers' Project*, the Court relied on the fact that it discriminated on the basis of content. 481 U.S. at 229-230. The DoD regulations do not draw distinctions based on content. The First Amendment does not prohibit Congress from setting different mailing rates for newspapers and periodicals than it does for other material. See *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288, 301, 303-304 (1913); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 155, 158 (1946); *The Enterprise, Inc.* v. *United States*, 833 F. 2d 1216, 1223-1226 (6th Cir. 1987). *A fortiori*, Congress may constitutionally limit a statutory fee preference for those persons seeking government records to persons who are in the business of disseminating genuine "news" directly to the public.

ple, although respondent relies (Br. in Opp. 9) on Senator Leahy's reference to an organization that "regularly publishes or disseminates information to the public" (132 Cong. Rec. 27,190 (1986)), he also identified a "newspaper, magazine, [or] television or radio station" as the sort of entity for which the exemption was designed. *Ibid.* Similarly, the statement of Representatives English and Kindness quoted by respondent (Br. in Opp. 10) identifies those accepted members of the news media in the very sentence that mentions other entities "in the business of * * * disseminating information." 132 Cong. Rec. H9463 (daily ed. Oct. 8, 1986). As a result, neither statement necessarily means that an entity that is not part of the media as commonly understood, and that does not disseminate genuine "news," would qualify. But if the floor statements respondent quotes are read more broadly to encompass entities that disseminate any sort of information, even if not "news," they conflict with the statement of Senator Hatch, another sponsor of the bill, who stated that the term "media" should be interpreted "in the traditional and common sense meaning of that term" (132 Cong. Rec. S16,505 (daily ed. Oct. 15, 1986)). According to Senator Hatch, "the fee and fee waiver language * * * is phrased in very clear and plain terms, which should be construed and applied according to their ordinary and common meanings. Certainly no extraordinary meaning is intended to be conveyed by use of terms such as * * * 'media' " (*ibid.*).

Furthermore, if read in the expansive manner respondent proposes, the floor statements respondent quotes cannot be reconciled with Congress's deletion of a proposed statutory fee preference for "a nonprofit group that makes information available" to the public—a provision that would have specifically covered respondent's activities. See Pet. 20-21. Respondent attempts to avoid the obvious import of this deletion by asserting (Br. in Opp. 8) that the provi-

sion was confined to entities that passively open their files to readers or act as "intermediaries" in securing government information. However, Senator Hatch clearly explained that in light of the deletion, the statute would not grant a preference to a requester "simply on the basis of his status as a disseminator of public information" (132 Cong. Rec. S16,505 (daily ed. Oct. 15, 1986)).

5. Respondent argues (Br. in Opp. 9-10) that the decision below furthers what it believes to have been the "general aim" of the 1986 amendments of the FOIA fee provisions of increasing the availability of government records. This argument begs the question. Congress intended to broaden access only for requesters who fall within a preferred category. For others, the fee provisions were drafted "so that more of the costs of FOIA will be recouped" (132 Cong. Rec. 26,764 (1986) (remarks of Sen. Leahy)).

6. Respondent modestly contends that this case is of no "great practical importance" (Br. in Opp. 5, 16-18). But it does not dispute our submission (Pet. 24-26) that the unwarranted expansion of the fee exemption fashioned by the court of appeals removes a meaningful and reasonable financial incentive for requesters to tailor their FOIA requests, and that entities such as respondent—any of which can sue in the District of Columbia—will have carte blanche to deluge agency FOIA offices with wide-ranging requests. Nor does respondent deny that this potential is borne out by the experience with the enormous number of requests, many wide-ranging, submitted by respondent alone. Respondent's only answer is the bald and erroneous assertion that this "is just what Congress envisioned" (Br. in Opp. 17).

Respondent also speculates (Br. in Opp. 17) that legitimate representatives of the news media will seek a fee preference and request documents even if the judgment below is reversed. But presumably because they are in the business of disseminating genuine news, rather than amass-

ing government documents in a private archive, experience has demonstrated that these intended beneficiaries of the fee exemption have in fact tailored their FOIA requests and operated in the responsible manner Congress envisioned. Contrary to respondent's contention (*ibid.*), there is no reason to believe that true representatives of the news media or educational institutions will request documents on anything approaching the potentially limitless scale of the requests that respondent has already submitted.

Respondent admits (Br. in Opp. 17) that it permits "hundreds" of readers to gain access to the government records it has collected in its archive without the necessity of their making, and paying for, FOIA requests to the agency concerned. If respondent is correct that the term "representative of the news media" means anyone who publishes some sort of information, other groups interested in any other area of governmental activity would be free to establish their own archives of government records at government expense simply by the expedient of occasionally publishing sets or indices of those records. Congress did not intend the carefully circumscribed exemption in 5 U.S.C. 552(a)(4)(A)(ii) to have that extraordinary effect.

For the foregoing reasons and those in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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